81-1029

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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; AND BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Petitioners,

v.

JOSEPH TERRELL, JR., WALTER DUDLEY, THOMAS GREEN, JOHNNY LONG, ALBERT MASON, MARCUS OAKES, SAM WALKER, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~FIFTH~~ ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the decision of the Court of Appeals, that seniority systems (held bona fide and nondiscriminatory by the District Court under *Teamsters v. United States* tenets) are *per se* discriminatory because they originated in 1940 in a discriminatory employment environment and perpetuate pre-Act discrimination, is consistent with the *Teamsters* decision.*

Subsidiary Questions:

A. May a transfer of employees between bargaining units pre-Act (1950) be held to infect the seniority systems with illegality and to be actionable consistently with decisions of the Supreme Court.**

B. May the failure to amend seniority systems, held to be legitimate, neutral and *bona fide* by the District Court, be held to show discriminatory intent in the origin and maintenance of the systems, consistently with decisions of the Supreme Court.

II. Whether a federal court of appeals is bound by the "clearly erroneous" rule of F.R.Civ. P. 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system.**

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*On this issue, certiorari has been granted in *Swint v. Pullman-Standard Company*, No. 80-1193, and petition for certiorari has been filed in *U.S. v. Georgia Power Co.*, No. 80-2117.

**On this issue, certiorari has been granted in *Swint*, No. 80-1193.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties to this proceeding in the Court of Appeals:

United Steelworkers of America, AFL-CIO, and United Steelworkers of America, Local 2140;

Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local 583;

International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 359;

International Molders and Allied Workers Union, and its Local 342;

The Patternmakers League of North America, and Patternmakers Assn. of Birmingham;

"all black persons who have at any time after March 24, 1969 (or who may hereafter be) employed as production and maintenance employees at the Bessemer, Alabama, plant of U.S. Pipe and Foundry Company," a class for which the named plaintiffs were certified as representatives; and

The Equal Employment Opportunity Commission, *Amicus Curiae.*

In the District Court, the United States Pipe and Foundry Company, a subsidiary of Jim Walter Resources, Inc., was a party defendant.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; AND BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Petitioners,

v.

JOSEPH TERRELL, JR., WALTER DUDLEY, THOMAS GREEN, JOHNNY LONG, ALBERT MASON, MARCUS OAKES, SAM WALKER, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The International Association of Machinists and Aerospace Workers and the Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Joseph Terrell, et al. v. United States Pipe & Foundry Co., et al.*, entered on May 14, 1981.

OPINIONS BELOW

The opinion of the District Court is reported at 22 FEP Cases 1695 (M.D. Ala. 1979), and is reprinted in the separate Appendix hereto as App. B (1b-27b). The opinion of the Court of Appeals is reported at 644 F.2d 1112 (CA 5, 1981), and is reprinted as Appendix A (1a-31a).

JURISDICTION

The Court of Appeals entered judgment on May 14, 1981. App. C (1c-2c). Timely petition for rehearing was denied on August 7, 1981. App. D (1d-2d). On October 9, 1981, Mr. Justice White extended the time for filing this petition to and including December 7, 1981. App. E (1e). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The pertinent parts of Sections 703(a), (c) and (h) and 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a), (c) and (h), and -5(g); of the Civil Rights Act of 1866, 42 U.S.C. § 1981; and of Rule 52(a), F.R. Civ.P., are reprinted in an appendix in the back of this petition.

STATEMENT OF THE CASE

A. District Court Proceedings

Respondents filed this class action for employment discrimination on behalf of themselves and other black employees of the Bessemer, Alabama, plant of U.S. Pipe and Foundry Company on October 4, 1972. Jurisdiction in the District Court was based upon Section 703 of the 1964 Civil Rights Act [42 U.S.C. § 2000e-2(c)] and 42 U.S.C. § 1981. The action was brought against the employer and

twelve unions—six local unions and the international unions with which they were affiliated. Prior to trial on the liability issues, a non-prejudicial settlement was reached between all parties on amendments to the seniority system and affirmative relief. Settlement was also reached between the plaintiffs and the Company on money issues.

Summary judgment was granted in favor of the Electrical Workers Unions. The liability issues against the remaining unions [1] were tried on the claim that the seniority systems were not bona fide and had been negotiated and maintained for discriminatory purposes, that the seniority systems perpetuated post-Act the effects of pre-Act discrimination of the Company in hiring, promotion and job placement of employees, and that the Unions (petitioners) had a post-Act duty to revise their seniority systems. It was not claimed that the seniority systems were not facially neutral as to race or that they were applied in a discriminatory manner, but it was claimed that the seniority systems negatively impacted more black employees than white employees in their desire for transfer and promotion. The unions contended that the seniority systems were bona fide and had not been instituted or maintained with discriminatory intent and that they were immunized from liability by Section 703(h) [42 U.S.C. § 2000e-2(h)] under the decision of this Court in *Teamsters v. United States*, 431 U.S. 324 (1975). The plaintiffs agreed that

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[1] International Association of Machinists and Aerospace Workers and Local Lodge 359; Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers and Local 583; International Molders and Allied Workers Union and Local 342; Patternmakers League of North America and Patternmakers Association of Birmingham; and United Steelworkers of America and Local 2140. App. B (3b, note 2).

they would not seek back pay from the Steelworkers Unions unless evidence introduced by the defendants demonstrated Steelworker liability. App. B, 2b-7b.

Relying upon this Court's decision in *Teamsters*,[2] the District Court found that, while the collective bargaining units and resulting seniority systems had their origin in a discriminatory employment structure in 1940 and earlier, that fact did not establish a causative relationship between racial discrimination and the seniority systems. App. B, 20b, 21b. The Trial Court found that the seniority systems were racially neutral (App. B, 13b-15b); that, with the exception of a 1950 transfer of employees between bargaining units in which the national unions did not participate, (discussed *infra*), the collective bargaining units were rational and in accord with industry practice (App. B, 15b-20b); that the seniority systems were bona fide, with the exception of the 1950 transfer of employees, (App. B, 25b) and were not established or maintained for discriminatory purposes and that the Unions' post-Act failure to revise the seniority system was not discriminatorily motivated (App. B, 21b-24b). The Trial Court also held that the burden of proof under Section 703(h) rested upon the unions (App. B, 13b) but found that the unions carried that burden (App. B, 25b); and it held [3] that consideration of the numerical impact of the seniority systems was virtually foreclosed by *Teamsters* where on similar facts this Court held that the seniority system was neutral [4] (App. B, 14b).

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[2] *Teamsters Union v. United States*, 431 U.S. 324 (1975).

[3] In this ruling the Court referred to the earlier decision of the Fifth Circuit in *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976).

[4] 431 U.S., at 352-355.

The District Court entered decision in favor of the national unions and all local unions, except Machinists Local Lodge 359 and Boilermakers Local 583 which had participated in the 1950 transfer of employees. These locals were held liable to employees affected by the 1950 transfers. App. B, 24b-27b. The District Court entered a Rule 54(b) certificate (App. J, 1j) that there was no just reason for delay and directed entry of final judgment in favor of all Unions, except Locals 359 and 583, and final judgment was entered (App. K, 1k) from which plaintiff appealed.

An Order dismissing all claims against Machinists Local Lodge 359 and Boilermakers Local 583, except those arising from the 1950 transfer of employees, was entered (App. L, 1l) and the District Court issued a certificate pursuant to 28 U.S.C. § 1292(b) that the legality of the seniority system involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation. App. M, 1m. Plaintiffs' application for permission to appeal was granted by the Fifth Circuit.

B. The Seniority Systems

The history of the collective bargaining units at the Bessemer Plant of U.S. Pipe is recited in *United States Pipe and Foundry Company*, 19 NLRB 1016, 1021 (App. F, 9f):

> Prior to 1934 the P.M.A. [Patternmakers], the I.A.M. [Machinists], and the I.M.U. [Molders] had represented the patternmakers, machinists, and molders, respectively, employed by the Company, and these three organizations had negotiated with the Company on behalf of such employees, with regard to

grievances, wages, hours and other working conditions. No contracts resulted from these negotiations. In 1934 the Company negotiated with an A.F. of L. federal labor union, which embraced employees other than those within the jurisdiction of the three organizations above mentioned. As a result of the 1934 negotiations, the Company promulgated certain working rules and regulations applicable to all employees. In 1935 the federal labor union had been absorbed by the I.M.U., which in 1934 had extended its jurisdiction to include all workers employed in the production of castings. The 1934 rules and regulations were, in substance, renewed by the Company in 1935 and 1936, after negotiations with a committee of employees and representatives of the P.M.A., the I.A.M., and the I.M.U. None of the foregoing negotiations resulted in a contract nor was any union formally recognized as the representative of any employees.

Following negotiations of the five A.F. of L. unions [including Boilermakers and Electricians], the Company entered into an agreement of April 14, 1938, referred to above, recognizing each union as collective bargaining representative of its members employed at the Bessemer plant.

In 1939 the Steelworker Unions [by predecessor Steelworker Organizing Committee] petitioned the NLRB for an election in a single bargaining unit comprised of all production and maintenance employees. The other unions intervened. The Molders sought a unit of all craft molders and all other production employees excluding those represented by the other craft unions. The other craft unions sought units comprised of craft and related employees. The NLRB held a self-determination election and ultimately certified the craft unions except the Molders to represent their crafts and related employees and the Steelworkers to represent all other employees.[5] All of these

[5] 19 NLRB 1016 at 1024, 1025, App. F, 14f-17f; 21 NLRB 671 at 674-676, App. G, 6g-9g.

events occurred prior to the recollection of witnesses and the Board's decisions recite virtually all of the facts of record. The Board (and the District Court) found that the Machinists did not admit black members in 1939 and the District Court found that in 1939 the Boilermakers placed black members in auxiliary locals; but the Board and the District Court found that both unions were willing, and sought, to represent black employees.[6]

In 1949, following enactment of the Taft-Hartley Act, which mandated the Labor Board to permit the establishment of craft bargaining units,[7] the Board held an election and certified the Molders as the representative of the employees in that craft. App. H, 1h-5h.

The District Court properly found that the establishment of these collective bargaining units and the structuring of seniority units along bargaining unit lines was in accordance with the policy and practice of the Board and of industry and that they were rational. App. B, 16b, 17b.

The seniority systems negotiated by all of the unions, including the Steelworkers, were substantially identical and conformed to the pre-existing operational units of

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[6] 19 NLRB, at 1020, App. F, 7f; 22 FEP cases, at 1700, 1701 (App. B, 16b). Notwithstanding these findings of the Board and District Court, there was testimony at the District Court trial that the Machinists Local Lodge had black members who attended union meetings in 1937 and had a black officer prior to World War II (June, 1979, transcript, pp. 212, et seq.; 217-219, 228-9, 232); and that the Boilermakers Local had black members as early as 1944 and a black officer in 1955 (June, 1959, transcript, pp. 301-2). There was no evidence or claim that any union practiced segregation or racial discrimination post-Act.

[7] 29 U.S.C. § 159(b)(2).

employees which had been established by U.S. Pipe. This resulted in the Steelworkers having 24 seniority units, the Machinists had 5 units, and the other four unions each had one seniority unit. App. B, 8b, 9b.

In all of these units, including those of the Steelworkers, seniority for purposes of promotion, layoff and recall was based upon continuous service within each seniority unit. The Steelworkers and IAM contracts permitted employees who transferred to another seniority unit represented by those unions, respectively, to retain seniority in his old unit in event of layoff until recall to the new unit, at which time an election between the two units would have to be made. App. B, 9b.

The District Court, while placing the burden of proof of Section 703(h) immunity upon the unions (App. B, 13b), found that the seniority systems were racially neutral, and had been applied in a uniform manner. App. B, 14b. While acknowledging that the racial job structure established by the Company necessarily entered into the original NLRB elections, the District Court found that the structuring of the representational units was rational and in accord with NLRB precedents and industry practice. App. B, 16b-18b. The Court also found that the seniority system adopted and maintained from 1940 until 1971 by the predominantly black Steelworkers was essentially identical to the systems adopted by the predominantly white craft unions and that in each instance the systems were adopted for other than racial reasons. App. B, 21b, 22b.

In 1940 the NLRB included helpers (black and white) in the bargaining units of employees, both craft and Steelworker, with whom they worked. Helpers included crane hookers working in the craft departments whereas the

skilled crane operators, including those assigned to the craft departments, were placed in the Steelworkers bargaining unit. As time passed, crane hookers in the craft bargaining units had no opportunity to promote to crane operator vacancies in the Steelworkers bargaining unit. Additionally, U.S. Pipe retained the unilateral right to select and hire persons for craft apprentice and trainee positions and by practice selected only white helpers for such opportunities.

As a consequence by 1950 black helpers working in the craft departments were dissatisfied with their promotional opportunities and had joined the Steelworkers Union and were pressing U.S. Pipe to transfer them to the Steelworkers bargaining unit. Additionally some white crane and machine operators and white helpers assigned by the NLRB to the Steelworkers bargaining unit but working with craft employees had joined the craft unions and desired to be transferred into the craft bargaining units.

In October, 1950, these pressures resulted in U.S. Pipe proposing a transfer of these employees between bargaining units and the three local unions affected (Steelworkers, Machinists and Boilermakers) agreed to the transfers desired by the employees. Appendix I, 1i-4i.

This transfer of employees was not a change in the seniority system, but it clearly was attended by racial considerations and affected the seniority expectancies of the employees concerned.[8] While the decision of this Court in *United Air Lines v. Evans*, 431 U.S. 553 (1977) appears to bar the actionability of this event, the District Court

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[8] At the time, in 1950, the transfer was desired by the employees concerned and was designed to improve the job opportunities afforded to them by the job practices of U.S. Pipe. See App. I, 1i-4i.

held that the event gave rise to liability to the employees transferred by the local unions who participated in the transfer. App. B, 22b, 25b, 26b.

In 1968, 1971, 1974-1975, and 1977, contract negotiations the Company suggested that the unions agree to amend the seniority systems to provide plantwide seniority. In 1971 the Steelworkers and the Machinists adopted limited intra-bargaining unit seniority carry over and in 1975 and 1977 all of the unions agreed to interunit seniority carry over but with first preference on vacant jobs being given to employees in the seniority unit where the vacancy occurred. Agreement on broad seniority carry over was not reached until just prior to the District Court trial. The District Court properly found from the evidence that the failure of agreement was not due to racial causes and noted that part of the reason for failure was a disagreement within the Steelworkers Union about seniority carry over rights. App. B, 10b, 22b, 23b.[9] While the predominantly black Steelworkers seniority system divided the employees it represented into 24 separate seniority units, the Steelworkers did not agree upon broad seniority carry over in its own bargaining units until the pre-trial settlement.

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[9] In 1971 and 1974 negotiations, the Steelworkers proposed that employees would have the right to bid on job vacancies across unit lines on the basis of seniority and minimum job ability. U.S. Pipe, on the other hand, insisted that seniority would control only if skill, ability and job knowledge (in the Company's opinion) were substantially equal. The Steelworkers were afraid that the Company requirements would enable the more skilled employees, both from within the Steelworker's bargaining unit and from the craft units, to bid from one preferred job to another, thereby by-passing senior employees. June 1979, transcript, pp. 118-124, 260.

In conclusion the District Court found that the seniority systems, with the exception of the 1950 transfers, were bona fide and had not been negotiated or maintained with discriminatory intent. App. B, 25b. In so ruling, the District Court held that the fact that the seniority systems had an adverse impact (lock-in effect) numerically upon more black employees than white employees did not compel a conclusion that the systems were not racially neutral (App. B, 14b, 15b); and held that the fact that the seniority systems had their genesis in a pre-Act discriminatory employment environment did not compel a conclusion that the seniority systems were caused by that fact or that they were discriminatorily motivated (App. B, 20b, 21b).

C. Court of Appeals Decision

Relying upon the third of the four factors for measuring the immunity of a seniority system under Section 703(h) enunciated in *James v. Stockholm Valves*, 559 F.2d 310, 352 (CA5, 1977) cert. den. 434 U.S. 1034, the Fifth Circuit held that the seniority systems had their "genesis in purposeful racial discrimination" because they "arose in an era of overt racial discrimination at U.S. Pipe." [10] The Court held that it had already decided in *Swint v. Pullman-Standard*, 624 F.2d 525 (CA 5, 1980) and *United States v. Georgia Power Co.*, 634 F.2d 929 (CA5, 1981) that immunity under 703(h) would not be extended to any seniority system which had its origin in a segregated pre-Act employment structure, which obviated the necessity for finding "purposeful discrimination in connection with the establishment . . . of the system;" because in

[10] The seniority systems, discussed *supra*, originated in the collective bargaining units established by the Labor Board decisions in 1940 and 1949. App. F, G & H.

such circumstances the Court finds "evidence of discriminatory intent under each of the *James* factors and the totality of all circumstances." App. A, 17a, 18a.[11]

The Court found that the District Court erred in holding that the Bessemer seniority systems were negotiated and maintained free of discriminatory purposes because "we again face a situation in which

> "the seniority system negotiated through the collective bargaining process tracked and reinforced the purposefully segregated job classification scheme maintained by the company [pre-Act] and the conclusion is inescapable that the seniority system itself shared that same unlawful purpose . . ." (App. A, 18a.)

The Fifth Circuit further held that the transfer of employees between bargaining units in 1950, in which U.S. Pipe and the Steelworker, Machinist, and Boilermaker local unions participated, manifested racial discrimination and infected the entire seniority systems with illegality,[12] so that the petitioner national unions were responsible therefor and that the District Court had erred in confining liability for that event to the participating local unions. App. A, 18a.

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[11] Certiorari has been granted in *Swint*, No. 80-1193. Petition for a writ of certiorari is pending in *Georgia Power*, No. 80-2117. While, in this case, the Fifth Circuit did not expressly rely upon *East v. Romine, Inc.*, 518 F2d 332, 339 (CA 5, 1975) in which it held that "discrimination *vel non*" is an ultimate fact which may be determined by the appellate court free of the clearly erroneous standard of FRCP 52(a), the Court's reliance upon *Swint* which did invoke the rule of *East v. Romine* and upon "the totality of circumstances" make it apparent that in this case the Fifth Circuit reached its conclusions even though the District Court's findings were authorized by the evidence.

[12] A similar holding was made in *Swint*, as to which certiorari has been granted. Note 11, *supra*.

The Fifth Circuit also ruled, contrary to the command of *Teamsters* and this Court's construction of the Congressional intent manifested in Section 703(h), that disparate impact of a seniority system, resulting from the employer's pre-Act hiring and job assignment practices, "constitutes not only relevant evidence of discriminatory purpose" but can conclusively resolve the racial "equality" factor against the seniority system, contrary to the findings of the District Court (App. A, 19a) and thereby held contrary to *Teamsters* that the "lock-in" effects of a seniority system compel the conclusion that the seniority system has a "discriminatory purpose." (App. A, 14a, 19a.)

Finally, the Fifth Circuit found that the Steelworkers Unions had appealed from the decision of the District Court in favor of those Unions, when in fact such an appeal was, and is, non-existent. But the Fifth Circuit went further and decided the hypothetical issue arising from that non-existent appeal in favor of the Steelworker Unions. App. A, 8a, 9a, 21a, 24a, 25a. In deciding this imaginary appeal the Court found, contrary to the evidence relied upon by the District Court and contrary to the District Court's findings, that the Steelworker Unions had taken "every reasonable step to bring about plant-wide seniority". App. A, 24a.

The conclusions of the Fifth Circuit concerning the Steelworkers Union are in strange contrast to its findings concerning those same unions in *Swint*, now before this Court for review in No. 80-1193. Those findings would be immaterial to this petition were it not for the conclusions of the Fifth Circuit in this case (1) that one union has the duty to negotiate amendments to the seniority system in a collective bargaining unit represented by another

union and (2) that, contrary to *Teamsters*, a duty to amend a seniority system arises from knowledge that the seniority system has a disparate impact (perpetuates pre-Act discrimination by the employer), even though, as found by the District Court, the seniority system by *Teamster* tenets is bona fide and legal.

In conclusion, the Court of Appeals held that the seniority systems of petitioner were not bona fide because the record clearly demonstrates discriminatory purposes underlying the creation and maintenance of the systems, but that the substantially identical systems of the Steelworkers Union were bona fide because the Steelworker Unions took every reasonable effort to eradicate discrimination. App. A, 31a.

The decision of the Court of Appeals was based upon its holdings, recited *supra*, that all seniority systems which originated pre-Act in a discriminatory employment environment and which perpetuate the effects of pre-Act discrimination necessarily have a discriminatory purpose and intent.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With Decisions Of This Court And Of Other Circuits

Section 703(h) of Title VII provides:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . 42 U.S.C. § 2000e-2(h).

In *Teamsters v. United States*, the seniority system had its genesis in a discriminatory employment structure created pre-Act by the employer [13] and the system perpetuated post-Act the impact of that discrimination upon black employees.[14] Notwithstanding these facts, it was not considered in *Teamsters* that the seniority system had its genesis in racial discrimination or had been maintained with illegal purpose and this Court held that the system was *bona fide* because it applied equally to all racial groups.[15] This Court held that Section 703(h) protects bona fide seniority systems even if they perpetuate the effects of prior intentional discrimination by the employer. 431 U.S. at 349-54. In so holding, the Court rejected the contention that a seniority system which perpetuated prior discrimination could not be bona fide, stating that, "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54.[16]

The reason for this conclusion, the Court said, was that:

> Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination . . . the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and

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[13] 431 U.S. 324, 342, 343 (1977).

[14] 431 U.S. at 344, 345.

[15] 431 U.S. at 355, 356.

[16] Similarly, in *Trans-World Airlines, Inc. v. Hardison*, the Court stated: "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." 432 U.S. 63, 82 (1977).

> thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act. 431 U.S. at 352, 353.

It is implicit in the *Teamsters* decision that the origin of a seniority system in a discriminatory employment environment in pre-Act times does not constitute "genesis in racial discrimination" and that continuation of the system with knowledge that it tends to perpetuate the effects of pre-Act discrimination does not show that it has been "negotiated" or "maintained" for illegal purposes. 431 U.S. at 356.

Indeed, if such were not the case *all* seniority systems which have their origin in pre-Act times would be illegal [17] and the purpose of Congress in enacting Section 703(h) would be totally negated.

And yet that is exactly what the Fifth Circuit has decreed in this case by holding that the seniority system "had its genesis in purposeful racial discrimination" because:

> . . . the system arose in an era of overt racial discrimination at U.S. Pipe, when blacks were assigned to "dead-end" jobs, bargaining seniority units were defined by racial considerations, and seniority provisions allowed transfer to better units only through commission of "seniority suicide". See our refusal to extend section 703(h) immunity to similar seniority systems in *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), and *United States v. Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981). We need not decide

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[17] As the District Court noted, virtually all industrial environments were discriminatory in the 1940's and 50's. (App. B, 20b.) In fact until after the enactment of Title VII in 1964, the Fifth Circuit itself had only one black employee—a porter of all work.

whether the court's specific finding of the racial genesis of the Bessemer system is tantamount to a finding of "purposeful discrimination in connection with the establishment . . . of the system," *James*, 559 F.2d at 351, because here, as in *Swint* and *Georgia Power*, we find evidence of discriminatory intent under each of the *James* factors and the totality of all circumstances. App. A, 17a, 18a.

* * *

The disparate impact of the Bessemer seniority system on black employees is obvious and well documented by the record. The district court recognized this disparate impact but concluded that it was irrelevant. We have since held that disparate impact constitutes not only relevant evidence of discriminatory purpose, *Swint*, but can conclusively resolve the "equality" factor in favor of those who have suffered such discrimination. See *Georgia Power*. As for the district court's reliance upon the facial equality with which the Bessemer system operated, we merely note that here again "facial equality . . . was but a mask for the gross inequality beneath." *Georgia Power*, 634 F.2d at 935. App. A, 19a.

Thus, the Fifth Circuit cancels this Court's decision in *Teamsters* by holding that the seniority system, found by the District Court in this case to be *bona fide* and neutral [18] [App. B, pp. 13b-25b], is discriminatory without

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[18] *Bona fide* means "neutral, legitimate". *Teamsters*, 431 U.S. at 353, 355. In *United Air Lines v. McMann*, 434 U.S. 192, 197 and note 5 (1977), this Court approved the rulings of the Fifth and other circuits that a bona fide seniority system is one which is "genuine" or "authentic" and not a subterfuge. See *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 217 (CA 5, 1974); *DeLoraine v. MEBA Pension Trust*, 499 F.2d 49 (CA-2) cert. den. 419 U.S. 1009 (1974); *Steiner v. National League of Prof. Baseball Clubs*, 377 F. Supp. 945, 948 (D.C. Cal. 1974) aff'd. CA-9, October 15, 1975.

other evidence of discriminatory purpose and intent because it originated in a pre-Act discriminatory environment and because it adversely impacts black employees by perpetuating pre-Act discrimination of the employer.

In such decision the Fifth Circuit also ignores the holdings of this Court in *Trans World Airlines v. Hardison*, 432 U.S. 63, 82 (1977), that a ruling that a seniority system is illegal without a showing of discriminatory purpose is "inconsistent with the dictates of § 703(h), both on its face and as interpreted in the recent decisions of this Court" and that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."

While this Court has not as yet defined the nature of evidence necessary in a Title VII case to show a discriminatory intent which will deprive a seniority system of the immunity afforded by Section 703(h), the decisions of this Court in *Teamsters* and *Hardison* make it apparent that mere evidence of racially disproportionate impact which perpetuates pre-Act discrimination and knowledge of that impact, as in this case, is insufficient. Other circuits, contrary to the Fifth Circuit, have held, as this Court held in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 259 (1979); that:

> "discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of,"

it's adverse effects upon an identifiable group.[19]

Such is the test of Section 703(h) immunity which, unlike the Fifth Circuit, the Fourth Circuit has adopted in Title VII seniority cases. *Carroll v. Steelworkers*, 23 FEP Cases 238, 248, *aff'd per curiam* No. 80-1412 (4th Cir. Dec. 2, 1980); *Patterson v. American Tobacco Co.*, 634 F.2d 744, 750 (4th Cir. 1980); *Younger v. Glamorgan Pipe and Foundry Co.*, 20 FEP Cases 776, 784 (C.D. Va. 1979), aff'd. 621 F.2d 96, 97 (4th Cir. 1980). The District of Columbia Circuit and the Sixth Circuit have indicated accord with the Fourth Circuit rule and tacit disagreement with the Fifth Circuit application. *U.S. v. Trucking Employers, Inc.*, 561 F.2d 313, 319 (D.C. Cir. 1977); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1378 (6th Cir. 1977).

Requiring proof of intent as they do, these cases reject the Fifth Circuit's resurrection of the pre-*Teamsters* rule, which was prevalent among the circuits, that all seniority systems which have a disparate impact because of pre-Act job assignments are *per se* illegal.

Most, if not all, seniority litigation under Title VII presents claims of disparate impact. Hence, defensive assertions—that the seniority systems are *bona fide* and immune under Section 703(h)—present claims that the seniority systems are genuinely and legitimately used for the lawful purpose of establishing and neutrally maintaining seniority rights. In other words, Section 703(h)

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[19] Similar rulings were made in *Washington v. Davis*, 426 U.S. 229, 238-244 (the disproportionate impact must be traced to a purpose to discriminate on the basis of race); and in *Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (past discrimination cannot condemn action that is not itself illegal—proof of purposeful discrimination is necessary).

establishes a *bona fide* business purpose defense to claims that seniority systems impact disparately upon black employees who have been victims of pre-Act employer discrimination. Thus, the rules of proof (going forward with evidence) which have been established by this Court for the presentation of bona fide business purpose defenses in Title VII cases are applicable in seniority cases. *Cf.*, *Texas Department of Community Affairs v. Burdine*, 67 L.Ed 2d 207 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This accords with the implications of *Teamsters* and *Hardison* quoted *supra*, that the burden to prove a discriminatory purpose in a seniority system, which has been shown to be used for genuine, legitimate, neutral seniority purposes, rests upon the plaintiff.

However, both the District Court and the Fifth Circuit in the present case placed that burden upon the defendants. This procedural burden assumes a position of impossibility under the decisions of the Fifth Circuit in this case, *Swint* and *Georgia Power* and under the decision of the Fifth Circuit on remand in *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir., 1980), reversed, 68 L Ed.2d 290 (1981), on remand, 26 FEP Cases 1417 (5th Cir., Sept. 30, 1981). On remand the Fifth Circuit held in *Uncle Ben's* that the decisions of this Court in *Burdine*, *McDonnell Douglas* and *Waters* have no application in disparate impact (seniority) cases such as *Teamsters* and *James*. 26 FEP Cases at 1418.

Unless this Court reverses the decisions of the Fifth Circuit in this case, *Swint* and *Georgia Power*, the doctrine of *Teamsters* and the purpose Congress sought to attain by enacting Section 703(h) are at an end in the South (Fifth and Eleventh Circuits).

Subsidiary Rulings Requiring Review

1. The 1950 Transfer of Employees

The 1950 transfer of employees, while clearly attended by racial considerations, was made to improve the job expectations of the employees involved and to accord with their wishes. The transfer was not illegal in 1950, almost 15 years before enactment of Title VII. Nevertheless, the District Court held that it was not shown that modification of Board certified units accorded with industdustry practice [20] and was actionable as against the participating local unions, but not the international unions. The Fifth Circuit, notwithstanding the beneficent motives with which the transfer was attended and its legality in 1950, seized upon the transfer as proof that the entire seniority systems were illegally motivated and that the international unions were also liable. App. A, 18a.

In *Franks v. Bowman*, 424 U.S. 747, 762 (1976), in *Teamsters*, 431 U.S. at 356, 351, and in *United Air Lines*

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[20] Present counsel for the unions did not participate in the District Court proceedings and cannot answer as to why legal precedents for the transfer were not shown; however, NLRB Rules provide for such modifications and for Board determinations in event the parties are unable to agree upon modifications in collective bargaining units required by changes in employee communities of interest and by changes in industrial circumstances. Rules of National Labor Relations Board, Section 102.60(h); 29 FR 15918. Changes in collective bargaining units may be made by agreement of the parties or, absent agreement, by the Board. Both methods have equal efficacy. *Airborne Freight Corp.*, 142 NLRB 873 (1963); *Water Tower Inn*, 139 NLRB 842 (1962); *General Cable Corp.*, 139 NLRB 1123 (1962). This Court has recognized that acts of parties, legal when they occurred, long before a prohibitive statute is enacted, do not show illegal intent. *United Air Lines v. McMann*, 434 U.S. 192, 197-198 (1977).

v. Evans, 431 U.S. 553, 558-560, this Court held that relief under Title VII could not be predicated upon acts which occurred before the enactment of the statute. In *Evans*, the Court said:

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . . it is merely an unfortuante event which has no present legal consequences. 431 U.S. at 558.
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> . . . a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit. . . . Such a result would contravene the mandate of § 703(h). 431 U.S. at 559, 560.

The transfer of employees between bargaining units in 1950 was not a modification of the seniority systems even though it may have affected and improved the promotional and seniority expectations of the employees concerned. The transfer does not show intent to deprive employees of then non-existent statutory rights but was an attempt to improve the lot of employees under the employment practices existing at that time, which were not illegal in 1950.

The critical question then is: May a legal event occurring 14 and more years before the statute was passed be used 30 years later as a determinant of hidden illegal intent in a genuine, legitimate, neutral seniority system; or was the transfer "an unfortunate event which has no present legal consequences."

The answer is evident. Congress did not intend that union members of this generation should pay reparations for the amoral but not illegal acts of a prior generation;

and such is not equitable. The holdings that the transfer, which occurred nearly fifteen years before the statute was enacted, was a violation of the Act contravenes this Court's decisions in *Bowman*, *Teamsters* and *Evans*. The holdings also conflict with decisions of the Second and Fourth Circuit which give heed to the teachings of *Evans*, quoted above. *Cf.*, *Cates v. Trans World Airlines*, 561 F.2d 1064, 1072 (2nd Cir., 1977); *Sledge v. J. P. Stevens & Co.*, 585 F.2d 625, 644 (4th Cir., 1978). To hold otherwise destroys the purpose of Section 703(h).

2. Failure to Amend the Seniority Systems

The District Court found and concluded under *Teamsters* tenets and valid evidence that the seniority systems were *bona fide* and neutral and had not been negotiated or maintained for discriminatory purposes.

If the District Court's findings and conclusions were authorized by the evidence—and they were—there was no duty to amend or alter the seniority systems because

> Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights even at the expense of pre-Act discriminatees. *Teamsters*, 431 U.S. at 354.

The Fifth Circuit's findings, contrary to those of the District Court, that Steelworkers espousal of amendment of the seniority systems was blocked solely by craft union opposition is as fanciful and devoid of supporting facts as is the Fifth Circuit's finding that the Steelworkers filed an appeal from the District Court's judgment in this case. The fact is that none of the Unions, including the Steelworkers, fully supported broad amendment of the seniority systems; and the Court of Appeals did not reverse the District Court's specific finding, which was based on valid evidence, that the Steelworkers had an internal disagree-

ment concerning the desirability of such amendments. In fact, the Steelworkers did not amend their own seniority system prior to 1975 [21] other than to provide limited seniority carry over rights on opening level vacancies and in cases of lay-off. Similar provisions were adopted by the Machinists who also represented employees in multiple seniority units.

In finding a duty to amend the seniority system, the Fifth Circuit relied upon and resurrected its pre-*Teamsters* decision in *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir., 1974), an impact case. There and here the Fifth Circuit held that a union has a duty to seek amendments to another union's seniority system if it knows that that system has an adverse racial impact because of pre-Act job assignments. That decision ignores the fact that it is an unfair labor practice for one union to attempt to bargain with respect to the bargaining unit represented by another union [22] and fails to give interplay to the conflicting duties arising under two different statutes. *Cf.*, *Emporium Capwell Co. v. Community Organization*, 420 U.S. 50, 70 (1975).

II. The Decision Below Does Not Comport With Proper Standards Of Judicial Discipline In Its Failure To Observe FRCP 52(a).

Rule 52(a), Federal Rules of Civil Procedure, provides in pertinent part:

> . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to

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[21] All unions adopted carryover of plantwide seniority on filling vacancies, but with "unit preference", in their 1975 and 1977 contracts.

[22] Texlite, Inc., 119 NLRB 1792 (1958), enforced 266 F2d 349 (5th Cir., 1959); *Central Soya Co.*, 142 NLRB 930 (1963).

> the opportunity of the trial court to judge of the credibility of the witnesses. . . .

The District Court lived with this case for seven years through prolonged pretrial procedures and several pretrial conferences. App. B, pp. 3b-7b. The Court entered painstakingly detailed findings of fact on all issues in the case. The Court of Appeals did not address the specific findings of the District Court but adopted a series of broad characterizations of the record which do not reconcile with the specific findings of the District Court. Based upon policies predetermined in *Swint* and *Georgia Power*, the Court found discriminatory intent upon "the totality of all circumstances" which existed in pre-Act times. App. A, 18a, 20a.

While the Court did not in this case expressly rely upon *East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir., 1975) in which it held that "discrimination *vel non*" is an ultimate fact which may be determined by the appellate court free of the clearly erroneous standard of Rule 52(a), the Court's reliance upon *Swint*, which did invoke the rule of *East v. Romine*, and upon the generality of "the totality of circumstances", make it apparent that the Court in this case supplanted the detailed findings of fact of the District Court with policies predetermined in *Swint* and *Georgia Power*.

In this case as in *Swint* and *Georgia Power*, this failure to observe the judicial discipline required by Rule 52(a) merits supervisory review by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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